CONSIDERATIONS ON THE STATE CORPORATION IN FEDERAL AND INTERSTATE RELATIONS.

THE NORTHERN SECURITIES CASES.

PART III.

THE MINNESOTA SUIT.

53. The State of Minnesota filed a complaint in a State court against the Northern Securities Company, the Great Northern and the Northern Pacific Railway Companies, and James J. Hill as president of the Securities Company, and individually.

On January 7, 1902, Minnesota prayed leave of the Supreme Court of the United States to file an original bill against the Securities Company. The Court denied the motion on the ground that the Great Northern, and the Northern Pacific were not made parties, and it held that the defect was not curable by amendment since the Great Northern, being a Minnesota corporation, could not be impleaded by the State in a suit commenced in a Federal court. (Minnesota *v.* Northern Securities Co. (1902) 184 U. S. 199). The present suit having been properly commenced in a State court, was lawfully removed into a Federal court, so the Supreme Court will receive by this channel a case which it felt obliged to reject when presented directly.

This suit, like the others, was prompted by the acquisition by the Northern Securities Company of New Jersey of majority interests in the stocks of the Great Northern and the Northern Pacific Railways, and it has been removed into a Federal court upon proof that certain defendants are citizens of other States. A cause thus removed is determinable by the State law unless it belongs to the class of cases "controlled by the Constitution, laws and treaties of the United States, or by the general principles of commercial and mercantile law, or of general jurisprudence of national or universal application."[1] It will

[1] Hartford Insurance Co. *v.* Chicago &c. Railway (1899), 175 U. S. 100.

appear that this suit is governed to a great extent by the broader law, and much of this law has been already outlined in discussing the other suits.

54. The bill alleges that Minnesota, as the owner of public lands and institutions, and its citizens, as property-owners and business men, are injured by the stifling of railroad competition, which is alleged to be a result of the transaction. Reviewing a similar allegation in the Washington suit I came to the conclusion that it did not disclose a legal injury,[1] and this one should be disregarded for the same reason.

If Minnesota has a cause of action it arises from a violation of the following statutes recited in the bill:

"No railroad corporation or the lessees, purchasers or managers of any railroad corporation shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any other railroad corporation owning, or having under its control a parallel or competing line.[2]

"No railroad corporation shall consolidate with, lease, or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchise, or rights of property thereof, which owns or controls a parallel or competing line.[3]

"Section 1. Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this State, or in restraint of trade or commerce between any of the people of this State and any of the people of any other State or country, or which limits or tends to limit or control the supply of any article, commodity or utility, or the articles which enter into the manufacture of any article or [of] utility, or which regulates, limits, or controls or raises or tends to regulate, limit, control or raise the market price of any article, commodity or utility, or tends to limit or regulate the production of any such article, commodity or utility, or in any manner destroys, limits or interferes with open and free competition in either the production, purchase or sale of any commodity, article or utility is hereby prohibited and declared to be unlawful.

"That when any corporation heretofore or hereafter created, organized or existing under the laws of this State, whether general or special, hereafter unites in any manner with any other corporation wheresoever created, or with any individual, whereby such corporation surrenders or transfers, by sale or otherwise, in whole or in part, its franchises, rights or privileges or the control or management of its business to any other corporation or individual, or whereby the business management or control of the business

[1] See S. 51. [2] Gen. Laws of Minn. 1874, C. 29.
[3] Gen. Laws of Minn. 1881, C. 94.

of such corporation is limited, changed or in any manner affected, and the purpose or effect of such union or combination is to limit, control or destroy competition in the manufacture or sale of any article or commodity, or is to limit or control the production of any article or commodity, or is to control or fix the price or market value of any article or commodity, or the price or market value of the material entering into the production of any article or commodity, or in case the purpose or effect of such union or combination is to control or monopolize in any manner the trade or commerce, or any part thereof, of this State, or of the several States, such union, combination, agreement, arrangement or contract is hereby prohibited and declared to be unlawful."[1]

Read together, these sections disclose a general prohibition of contracts, conspiracies, etc., in restraint of trade, and special prohibitions imposed upon corporations. The bill alleges the violation of both general and special prohibitions, but I think the charge of conspiracy is quite as mistaken in this as in the United States suit.[2] If the transaction is forbidden by the prohibitions in respect of corporations, the charge of conspiracy is superfluous. If it is not forbidden it is lawful, and the charge fails.

55. The question is whether the transaction is within the purview of the provisions of the corporation law of Minnesota contained in these statutes.

At the outset of the inquiry it should be remarked that while the corporation now called the Great Northern Railway company appears to have once enjoyed a power to consolidate with other lines, the Supreme Court has decided that, so far as this power was unexecuted, it was merely a revocable license, revoked in fact by the Act of 1874.[3]

The prohibitions addressed to corporations are, broadly: First, a railroad corporation shall not acquire control of another which owns or controls a parallel or competing line; second, a railroad corporation shall not "consolidate" with another which owns or controls a parallel or competing line; third, no corporation whatever shall "unite" contrary to the statute with any other corporation, or with any individual.

The Great Northern has not gained control of another corporation, so it has not violated the first prohibition.

[1] Gen. Laws of Minn. 1899, C. 359. [2] See SS. 8–10.

[3] See Pearsall *v.* Great Northern Railway (1895), 161 U. S. 646.

In construing the second and third prohibitions it seems the word "unite" in the act of 1899 should be given a broader meaning than the word "consolidate" employed in the earlier Acts. Two railroads might be deemed "united" within the meaning of the Act of 1899, though not "consolidated," and as the Great Northern, and the Northern Pacific, if not "united" are certainly not "consolidated" we will direct our attention to this Act.

The important question is, has the Great Northern united with another corporation contrary to the Act of 1899?[1] It does not seem material in this relation to inquire whether it has united with the Securities Company, or with the Northern Pacific, or with each. Suffice to say, the defendants will not strengthen their case by denying that two railroads are "united" in a sense, inasmuch as the Securities Company is in a position to elect the directors of each.[2]

Admitting that there is a union, is it of a kind forbidden by the statute? The condition has been brought about by what is essentially a sale of property,[3] and Minnesota seeks to have the sale set aside. In order to annul a sale, it must appear either that the vendor is incompetent to sell, or the purchaser to buy, and we must determine at once whether the sale of Great Northern stock to the Securities Company is, in theory of law, to be attributed to the railway corporation itself, and not to the individuals who figure as the vendors.

56. Pearsall *v.* Great Northern Railway Co.[4] suggests a test for identifying the true vendor. The Northern Pacific was in the hands of receivers appointed in foreclosure proceedings. It was planned that the road should be purchased by a bondholders' committee who should, thereupon, organize a new corporation, subject to prior mortgages, and issue $100,000,000 of bonds to be

[1] It is not necessary to lengthen the discussion by inquiring whether the Northern Pacific could prove exemption from this statute on the ground that it is merely doing business in Minnesota as a foreign corporation, because the State will defeat the purposes of the Securities Company if the sale of Great Northern stock be invalidated.

[2] See Ss. 18, 21. [3] See S. 8.

[4] (1895) 161 U. S. 646.

guaranteed by the Great Northern, and the same amount of stock, half of which was to be transferred to the shareholders of the Great Northern, or to a trustee for their use. The corporations were then to make a traffic agreement. The Supreme Court intervened at the suit of a Great Northern stockholder, because it found that the corporation itself would be the real purchaser of the Northern Pacific, and was forbidden by the Acts of 1874 and 1881, above recited, to acquire control of a rival road.

"That the transfer of stock is to be made," said the Supreme Court, "not directly to the company, but to the shareholders, is immaterial, since it may be assumed that they would cast their votes in the interests of the company. Either the stock so transferred becomes *virtually the property of the Great Northern, or there is no consideration for its guaranty of the principal and interest of the consolidated bonds.* But as, by the agreement, *the guaranty by the defendant of the Northern Pacific bonds is assumed to be in consideration of a transfer* to its stockholders of one-half the capital stock of the reorganized company, it would inevitably follow that this stock would be held for the benefit of the company. There is, however, in addition to that, an alternative provision that the transfer may be made to a *trustee for the use of the stockholders, who would, of course, act as their agent and represent them as a body, and, in fact, stand as the company under another name. Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such in common.* This, though possible, would not be altogether feasible, and would require considerable time for its accomplishment. In a few years the two companies might, by sales of the stock so acquired, become completely dissevered, and the interests of the stockholders of each company thus become antagonistic. Under the proposed arrangement, however, the Northern Pacific as a company, *in return for a guaranty, which the individual stockholders could not give,* turns over to a trustee for the entire body of stockholders of the Great Northern one-half of its stock, with the almost certainty of the latter securing the complete control, and probably the ultimate amalgamation, of the two companies. If such amalgamation were once effected, it would, in all probability, be final. We think the proposed arrangement is a plain violation of the acts of the State Legislature passed in 1874 and 1881, prohibiting railroad corporations from consolidating with, leasing or purchasing, or in any other way becoming the owner of, or controlling any other railroad corporation, or the stock, franchises or rights of property thereof, having a parallel or competing line."[1]

[1] 161 U. S. 671. The italics are mine.

The decisive matter of this passage is that whilst Great Northern stockholders intended to exercise their personal rights in buying Northern Pacific stock, their action was but part of a project requiring the participation of the Great Northern corporation as a guarantor for Northern Pacific bonds to be issued by the vendor of the stock. The Great Northern being a party to the consideration, the Court held that it would be the real purchaser. Judged by this *ratio decidendi* of the Pearsall case, the Great Northern is not a party to the sale of its stock in the case at bar, for it has not participated in the transaction, or assumed any responsibility because of its consummation.

57. When the Court said in the Pearsall case: "That the transfer of stock is to be made, not directly to the company, but to the shareholders, is immaterial, since it may be assumed that they would cast their votes in the interest of the company," it may have predicated the assumption on the provision for transfer to a trustee for the purchasers, "who," it says, "would of course act as their agent, and represent them as a body, and in fact stand as the company under another name." But the sentence may convey the idea that stockholders acting in their individual capacities can place their corporation in an illegal position without its co-operation, and here, I think, is an important question in this branch of the case at bar.

Doubtless there are things forbidden to a company acting regularly by the vote of its directors or stockholders that cannot be lawfully accomplished by stockholders acting individually, and from this, perhaps, Minnesota will argue, that because the Great Northern corporation is forbidden to unite with a rival railroad Great Northern stockholders are forbidden to contribute, by selling their shares, to the condition effected in the present case. But these actions are not alike from a legal standpoint.

Suppose A, B and C each owned enough shares of Great Northern to make together a majority of the stock, and each, unknown to the others, sold his holdings to the Securities Company, which had already acquired a majority of Northern Pacific stock; suppose C, knowing that A and B had already sold, should sell his holdings; suppose

D, owning a majority of the stock, should sell it. In each case a union like this would be effected, yet in neither would the Great Northern corporation be responsible under the statute.

In stating the reason for this conclusion we shall perceive that it is broad enough to cover the sales made by Great Northern stockholders with knowledge, it appears, of each other's intentions. This reason is suggested in the above passage from the opinion in the Pearsall case. "Doubtless, these stockholders could lawfully acquire by individual purchases a majority, or even the whole, of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common." The principle of this sentence is applicable to vendors as well as to vendees. Stockholders in a corporation may sell their shares—this has been done in the case at bar; unless their action will so affect two corporations as to destroy their separate identities and commingle their interests contrary to law. This has not been done; for, whereas in the Pearsall case the corporations would have had corporate interests in common in virtue of a Great Northern guarantee of Northern Pacific bonds, in this case neither has assumed any obligation to the other.

58. The opinion in the leading case of The People *v.* North River Sugar Refining Company[1] should be read in connection with the case at bar. This was an action to dissolve a New York corporation on the ground that it had become a party to an unlawful monopoly—the Sugar Trust. "The company has become," said the Court of Appeals, "an integral part and constituent element of a combination which possesses over it absolute control, which has absorbed most of its corporate functions, and dictates the extent and manner and terms of its entire business activity."[2] Contrasting these facts with the facts in the case at bar, we find that the Great Northern Railway is not a part or an element of a combination, but is controlled by a single stockholder, which has not absorbed—is indeed, incapable of absorbing—any of its corporate functions, and

[1] (1890) 121 N. Y. 582. [2] P. 609.

enjoys only such powers as enure to any majority stockholder. These powers are, in contemplation of law, of a circumstantial nature, and do not confer upon their possessor a legal status differing from that of the small holder.[1]

But the New York Court of Appeals did not find in the loss of corporate identity a sufficient ground for dissolution. It went on to say:

"We are yet to ascertain whether the corporation became the subordinate and servant of the board by its own voluntary action, or the will and power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault or its misfortune; by a sale or by a trust. For, if it has done nothing, if what has happened, and all that has happened, is ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth, and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business."[2]

Upon concluding its investigation the Court found that the entrance of the Refining Company into the Trust was effected by a corporate act formally authorized at a stockholders' meeting; and so it gave judgment for the State.

A review of Judge Finch's opinion in the Sugar Trust case confirms the proposition that a sale of shares by any number of individual stockholders is not equivalent to a corporate act, unless it appear that the corporation has itself participated in some way. The Great Northern Railway Company played no part in the sale of stock to the Securities Company. Therefore, we need not inquire whether the sale, if a corporate act, would have been illegal.

The vendors were, in law as in fact, individual stockholders, who, like all property owners, are supposed to enjoy the right to sell at pleasure. This right is not restricted in the Great Northern charter, and it is not necessary to decide whether Minnesota, in virtue of its reserved power over corporations, or its general police power, could

[1] See S. 21. [2] P. 610

forbid the stockholders to dispose of shares to a corporation like the Securities Company. A State's intention to restrict the enjoyment of a private right must be distinctly expressed, and the statutes on which this suit is founded contain no such expression. Viewing the transaction from the vendor's side, the stockholders appear to be competent to sell. To complete the survey we must determine whether the Company is competent to buy.

59. The complainant calls the Securities Company "a railroad corporation within the meaning of the laws of this State," evidently with the purpose of bringing it within the prohibition of the Acts of 1874 and 1881,[1] but it will be sufficient to consider whether the Company is subject to the broader Act of 1899, which applies to all corporations. The provisions of this Act which relate to corporations have not been construed by the Supreme Court of Minnesota, so we have no interpretation of its meaning, no decision that when stockholders in competing railroads sell majority interests to a third corporation the railroads "unite" within the meaning of the Act.

Supposing, however, that a corporation of Minnesota might be enjoined under the local law from purchasing majority interests in the Great Northern and the Northern Pacific, does this circumstance enable Minnesota to demonstrate that her statute operates of its own force against the New Jersey company? This demonstration is impossible unless the Company is within the jurisdiction of the State. It is not within the jurisdiction unless it comes within the territory, and it is not within the territory unless it is, in point of law, an owner of property therein,[2] for it does no business, nor is it obliged to perform any act in Minnesota, not even the act of voting for directors, since the Great Northern charter permits stockholders' meetings to be held out of the State, even in England.[3]

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[1] See Pearsall *v.* Great Northern R. (1895) 161 U. S. 646.

[2] When the Great Northern Railway is party to a suit in a Federal court it will be presumed that the Securities Company as a stockholder, is a citizen of Minnesota (see S. 36), but it is hardly necessary to say that this special rule does not attribute citizenship for any purpose other than Federal jurisdiction of the suit.

[3] Special Laws of Minn. 1865, Act of Feb. 28.

It is well settled that a foreign corporation cannot acquire property in a State in defiance of a plain prohibition,[1] and it appears that in Minnesota all corporations are forbidden to acquire a competing corporation—that is to say its property, for the corporation itself, being a person, is not, properly speaking, a subject of bargain and sale. If, then, the New Jersey Company holds property in Minnesota, consisting of the Great Northern and Northern Pacific Railways, it is within the jurisdiction of the State and the prohibition of the statute, but not so if the ownership remains where it was prior to the Company's acquisition, that is to say, in the railway corporations themselves.

60. The Pearsall case involved only the Great Northern, and Northern Pacific corporations, both assuredly within the jurisdiction of Minnesota, but in this case it is material to inquire whether Minnesota, having within its jurisdiction these railway corporations, each the titular and visible owner of property therein, can draw a foreign stockholder within the jurisdiction upon the assumption that its acquisition of stock in these corporations constitutes it the responsible owner of the corporate property, and thus subjects it to the prohibition of the statute.

This assumption ignores the radical and familiar distinction between the stockholder, whether a corporation or an individual, whether a large or small holder, and the corporation itself. The distinction has been already remarked,[2] and it is pertinently illustrated in the general proposition that, although the stockholder is in a sense the owner of one or more unsegregated shares in corporate property, the corporation is the owner of the property itself.[3] For example, it has been decided in Pennsylvania that a statute forbidding railway companies to own coal lands is not violated by a company acquiring stock in a coal-mining corporation.[4]

[1] See United Lines Tel. Co. *v.* Boston Trust Co. (1892) 147 U. S. 447; Commonwealth *v.* N. Y. L. E. & W. R. (1886) 114 Pa. St. 340.

[2] See S. 20; see Chicago Union Traction Co. *v.* Chicago (Illinois, 1902) 65 N. E. Rep. 470.

[3] Edwards *v.* Hale (1855) 6 D. M. & G. 92; Watson *v.* Sprateley (1854) 24 L. J. E. 57 by Parke, Baron; Hollins *v.* Coal Co. (1893) 150 U. S. 382.

[4] Commonwealth *v.* N. Y. L. E. & W. R. (1890) 132 Pa. St. 571.

61. In accordance with this distinction foreign members of domestic corporations are not, generally speaking, within the purview of laws imposing disabilities on aliens.

Great Britain prescribes that British ships shall be owned by none but British subjects, yet an alien may become a stockholder in a British shipping company,[1] and American capitalists have lately bought controlling interests in stocks of British companies with full acceptance of the legality of the action.

A statute prohibiting alien ownership of land is not violated by an alien acquiring stock in a domestic land-holding corporation. This has been accurately approved on the ground that the stock is personalty;[2] but the broad justification is given in an opinion sustaining a devise to a citizen trustee for an alien's use, though a devise to the alien would have been invalid. "The policy of law which prohibits aliens from holding title to land," said Judge Earl, "is to have the title in the hands of citizens, who owe allegiance to the government, and can be called upon to discharge the duties of citizenship."[3]

It seems that an alien owning stock in a domestic corporation, and becoming an enemy by the circumstance of war, is not an owner of property within the meaning of laws regarding enemy property, though the interruption of intercourse during hostilities may suspend the enjoyment of certain stockholder's rights.[4]

"An alien enemy who is prior, may sue for his convent, because he sues in his corporate capacity, and not to recover for himself, or to carry the goods and effects out of the land."[5]

These cases and opinions rest upon the common ground that a State, having jurisdiction of a corporation, has so efficient a control over its functions and its property, and such ample power to compel performance of its duties as to

[1] *Reg. v.* Arnaud (1846) 9 Q. B. 806; see also Benson *v.* Heathorn (1842) 1 Y. & C. 326.

[2] Opinions of Attorney General, xix, p. 26; Mining Co. *v.* Bank (1888) 7 Montana 530.

[3] Marx *v.* McGlynn (1882) 88 N. Y. 370.

[4] See Lindley's Companies Act (5th Ed.) p. 37 citing *ex parte* Boussmaker (1806) 13 Ves. 71.

[5] Gilbert, History of the Common Pleas 206, citing Co. Lit. 129a.

render the alienage of particular members presumably a matter of indifference.[1] They reinforce the conclusion that a foreigner—in this case the Securities Company of New Jersey—does not come within the jurisdiction of Minnesota as a property owner in virtue of acquiring stock in corporations chartered or licensed therein.

The Great Northern stock is personal property on principle, as well as by charter definition,[2] and according to a familiar rule the shares owned by the Securities Company are held in New Jersey, where the Company resides. The application of this rule in the case at bar is not affected by the fact that an incorporating State may tax foreign-held stock, even though it be taxed at the residence of the owner. The indefeasible actions of our sovereign States in reaching out for revenue do not form a reliable introduction to the general law of personal property.

62. Referring to the law of New Jersey for the *prima facie* measure of the Company's powers, we find that its purchase of stock is within the powers recited in the charter,[3] and authorized by the State.[4] Unless Minnesota can show that the purchase is somehow invalidated by its local law, the transaction is effective.

It may be conceded, that as corporations, generally speaking, are incompetent to buy shares in other companies, in the absence of express authority, they are commonly excluded from the category of purchasers. But can Minnesota convict a corporation beyond the jurisdiction of incompetency merely because it has not granted competency to corporations within the jurisdiction?

It may be conceded, further, that a State in chartering a corporation can exclude persons of a certain description —say foreign corporations—from becoming qualified stockholders, and thereby affect the stock with an organic limitation which it would be competent to enforce. But Minnesota authorized the issue of Great Northern stock

[1] This presumption may be qualified, however, by enactment, *e. g.*, a corporation, more than twenty per cent. of whose stock is held by aliens shall not acquire real estate in the Territories of the United States. 24 U. S. Stat. at Large 476.

[2] Laws of Minn. Territory (1856) C. 160. [3] See S. 12. [4] See S. 64.

without this condition, without any limitation on alienation whatever, thereby attributing to the shares an element of value which, if depreciable by subsequent legislation at all, can only be destroyed by a plain expression of intention. It is true that Minnesota has since forbidden corporations within its jurisdiction to control a competing railway by purchasing stock, and, so far as these might have purchased freely under earlier laws permitting consolidation,[1] there has been imposed what is, in effect, a limitation subsequent to this extent; but this prohibitory action seems to be the expression of a reserved power over the acquisitive capacity of corporations, and not of a power to restrict the marketability of stock.[2] Evidently Minnesota has no reserved power over the New Jersey corporation, and so, if it would annul the sale of stock in the case at bar, it must point to some direct and valid legislative restraint imposed on the stock itself. It is not necessary to affirm that Minnesota cannot constitutionally forbid the sale of local stocks to foreign companies by legislation subsequent to the charter, but the laws in question do not appear to go to this length.

Upon consideration it appears that the Securities Company is not subject to the prohibition of the Minnesota Acts. The Act of 1899 forbids a corporation to "unite" with an "individual" contrary to its tenor, as well as with another corporation. Whether this prohibition could be enforced against a citizen of Minnesota acquiring majority interests in two corporations, I do not stop to discuss. It seems that an individual in New Jersey need pay no attention to it, and if an individual in New Jersey may ignore it, so may a corporation in New Jersey, which is quite as free from the obligation of Minnesota's laws.[3]

63. While the Minnesota law does not constrain the New Jersey corporation of its own force it may be urged that the State of New Jersey should, as a matter of comity, prevent its corporation from disregarding the policy of a sister State, and that the Supreme Court is entitled to speak for New Jersey.

[1] See Pearsall *v.* Great Northern R. R., (1896) 161 U. S. 646.

[2] See Aspinwall *v.* Daviess County (1859), 22 How., 364.

[3] See SS. 26, 41.

The Supreme Court refers to "the general law of comity obtaining among the States comprising the Union"[1] and both Federal and State courts have applied it on occasion. But it is not for the Supreme Court to exercise comity on behalf of New Jersey without the State's consent as evidenced by its laws. "By comity," says the Court, "nothing more is meant than that courtesy on the part of one State, by which within her territory the laws of another State are recognized and enforced, or another State is assisted in the execution of her laws. From its nature the courts of the United States cannot compel its exercise when it is refused; it is admissible only upon the consent of the State and when consistent with her own interests and policy."[2]

64. What are New Jersey's "interests and policy" in respect of stockholding corporations? The Constitution of New Jersey is silent, and therefore not inimical. The general legislative policy is thus outlined by the Court of Errors and Appeals:

"Under our liberal corporation laws, corporate authority may be acquired by aggregations of individuals, organized as prescribed to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or, for a time at least, destroy competition."[3]

The Court mentions manufacturing and trading companies, which were involved in the case, and the Securities Company is not in this category, but it was organized under the General Corporation Law of 1896 which applies

[1] Christian Union *v.* Yount (1879) 101 U. S. 356.

[2] Mahon *v.* Justice (1887) 127 U. S. 706.

[3] Trenton Potteries Co. *v.* Oliphant (1899) 58 N. J. Eq. 524.

to all corporations save those expressly excepted, and unless it falls within an excepted class its capacities are as broad as those of the companies mentioned.

Section 7 of this Act prescribes that railroad companies shall not be organized under its provisions, but the Securities Company is not in this category. Railroad companies are also excepted from Section 104, which provides that two or more New Jersey corporations carrying on any business of the same or a similar nature "may merge or consolidate into a single corporation, which may be either one of said merging or consolidating corporations, or a new corporation to be formed by means of such merger or consolidation," but the Company has not effected anywhere what, under this Act, would be considered a "merger" or "consolidation" of railroads. This means the extinction of one or both corporations as a going concern, and the absorption of one by the other, or of both by a new corporation; and the surviving, or the new corporation thereafter owns all the property and exercises all the corporate functions. Neither the Great Northern nor the Northern Pacific has lost its powers, or its responsibility as an independent corporation.

The acquisition of stocks by the Securities Company is not a transaction of the kind condemned by the New Jersey Court of Chancery in Stockton *v.* Central Railroad Co.[1] for in that case the court enjoined the railroad company from operating under a lease of its property and franchises to another corporation, which had been made "in defiance of an express prohibitory statute."

The rule, that in the absence of special authority one corporation cannot buy stock of another for the purpose of controlling a competitor,[2] is merely a particular application of the principle that without authority a corporation cannot buy another's stock for any purpose whatever. By authority both purchase generally, and purchase for control may be accomplished, and this authority New Jersey apparently confers upon the Securities Company.

We find nothing in the laws of New Jersey that would justify a Federal court in declaring the Securities Company incompetent to acquire the stocks in question, nothing to

[1] (1892) 50 N. J. Eq. 52.

[2] See De La Vergne *v.* German Savings Inst. (1899) 175 U. S. 40.

show that the incorporators have misused the State law to float a bogus corporation. Besides, is not the status of a corporation, organized in formal accord with a State law, generally determinable by the courts of the State whose authority is involved, and not by the Federal courts?

65. New Jersey distinctly encourages the organization of stockholding companies—"trusts" if you like—a policy pursued despite abundant evidence of hostility in some other States of the Union. Is New Jersey's policy now on trial? If Minnesota shall prevail in the case at bar will other States be able to cripple other New Jersey companies holding stocks in their corporations?

In this conflict of State policies it almost seems that New Jersey should be entitled to defend in court its interests so substantially attacked by Minnesota. At all events these interests cannot be graciously surrendered by the Supreme Court of the United States as an act of comity, for even the New Jersey courts cannot exercise comity unless they are backed by the consent of their State.

Without inquiring how far "international law" and "international comity" are interchangeable terms in treating of the relations between separate nations, we must understand that they are not interchangeable as applied to the relations between the States of the Union. While each State may accord or withhold comity in certain cases, in others the Federal courts are empowered to administer a uniform international law.[1] But this law, even when thus administered, does not oblige one State to abandon a policy at the instance of another unless its execution inflicts a distinct legal injury upon the latter,[2] and in the case at bar the execution of New Jersey's policy, as evidenced by the ownership of stocks by the Securities Company, invades no personal or property right whatsoever in Minnesota.

I have spoken of a "conflict of policies." The situation will be better appreciated if we describe it as "a conflict of economic theories," each crystallized in laws of equal dignity, each entitled to respect so long as it does not inflict a legal, as distinguished from a political injury.

66. The result of our inquiry in regard to the transfer of stock is that Great Northern stockholders appear to have a

[1] See S. 50. [2] See S. 51.

right to dispose of their shares to any person competent to acquire them, and that the Securities Company is given competency by New Jersey, whose authority to empower its corporation cannot be impeached by Minnesota.

At this stage of the investigation, it is perceived that the position of Minnesota is not unlike that of Washington. Each seeks the enforcement of its peculiar policy, in disregard of the policies of its neighbor States through which the railways run,[1] and at the expense of the policy of New Jersey. To attain this end each would compel a foreign corporation, the Securities Company, to retire from business. But Minnesota, unlike Washington, is the incorporating State of one of the railways, and it remains to be seen whether this gives her an advantage that will enable her to press this suit to a successful conclusion.

67. Though Minnesota be unable to force the Company to surrender the stock, is it nevertheless entitled to injunctions, each impairing, and together destroying, the value of the stock in the company's hands? May the Great Northern be forbidden to pay dividends on the stock, to recognize any transfer or pledge thereof, to allow the Company to vote its shares at stockholders' meetings?

The Great Northern cannot be permitted, much less compelled, to set apart a dividend fund without regard to the Company's share, and thus deprive the stock of current earnings; nor to subtract this share from the fund, and thus convert it to its own use; nor to distribute the share among the other stockholders, and thus divert it to their use; nor can it hold the share in trust upon the supposition that some day the stock may be somehow transferred to qualified owners. It must ascertain and pay over the share to the Company for the sufficient reason that a right to participate in dividends is part of the charter contract in virtue of which the stock was issued. And for the same reason the Company cannot be prevented from exercising the owner's right to sell or pledge.

Furthermore, neither payment of dividends to, nor transfer of stock by, the Company contributes to the Company's control of competing railways, which is the gist of the alleged injury. It is only by voting for directors that this

[1] See S. 45.

control is exercised, and with this action alone is Minnesota concerned.[1]

68. The request that the Securities Company be enjoined from voting its shares of stock deserves particular consideration, in view of the fact that a corporation coming into possession of another's stock is not necessarily entitled to vote it at an election of directors. Decisions forbidding a corporate stockholder to vote shares improperly acquired, yet not disturbing its possession,[2] are irrelevant, because the Company's stock was lawfully acquired.

Nor are decisions relevant forbidding one corporation to vote shares of another acquired incidentally, as in payment of a debt, since the Company was chartered for the very purpose of acquiring shares.

In Clarke *v.* Central Railroad Company of Georgia[3] the defendant was enjoined by a judge of a circuit court from receiving the votes of a foreign corporation. The corporation seems to have been deemed incapable of owning the stock, but the main ground of decision was that as it already held a controlling interest in a competing railroad, it would, if allowed to vote, dominate two roads, and thus violate a provision of the Georgia Constitution forbidding the legislature to authorize one corporation to make with another any contract having, or intended to have, the effect of lessening competition or encouraging monopoly. In a later case,[4] however, another circuit judge refused to give to this constitutional provision the self executing force accorded in the earlier one. These opinions are not without interest in the case at bar, but as neither is authoritative we shall consider the position of the Securities Company in the light of general principles.

The charter of the Great Northern Railway corporation prescribes that directors shall be elected at an annual meeting. Unless the Securities Company is entitled to vote its shares at this election, its purpose is frustrated; holding a majority of the shares, it must stand aside while

[1] See Milbank *v.* N. Y., L. E. & W. R. (1882) 64 How. Pr. 27.

[2] See State *v.* Newman (1899) 51 La. Ann. 838; Milbank *v.* N. Y. L. E. & W. R. (1882) 64 How. Pr. (N. Y.) 20.

[3] (1892), 50 Fed. R. 338.

[4] Clarke *v.* Richmond &c. R. (1894) 62 Fed. R 328.

minority stockholders dictate the management of the corporation's affairs. It appears that at the last election the Company did not vote the shares actually standing in its name, but secured its chosen directors through the votes of its shares standing in the names of trustees; but I shall assume that if Minnesota can prevent the Company from voting in its own name, it can find a way to prevent it from voting in the names of agents.

The Company's right to vote its stock is established by a conclusive implication of law. When stock is issued, impressed with a charter right to vote, the right passes with the stock itself to all duly qualified holders. This is a valuable property right which the State cannot impair by subsequent legislation, unless it has reserved a power to repeal the charter in this respect.[1]

The Great Northern charter expressly confers this right,[2] and the State of Minnesota has not reserved a power of repeal. Hence the Securities Company, being entitled to figure as a qualified stockholder through an authorization which Minnesota cannot impugn, is entitled to vote its shares.

GENERAL CONCLUSIONS.

69. I have examined the Northern Securities suits with some particularity, yet a review article on these cases, though long drawn out, with the courtesy of the Editors, must be, after all, a survey rather than an exhaustive discussion.

The general results are summarized in the following statements:

I. The principal fact in each suit is the holding of a majority of Great Northern and Northern Pacific shares by the Securities Company with the purpose of voting them at stockholders' meetings, notably at elections of directors.

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[1] State *v.* Greer (1883) 78 Mo. 192; Baker's Appeal (1885) 109 Pa. St. 461; Lowenthal *v.* Rubber Co. (1894) 52 N. J. Eq. 440.

[2] Laws of Minnesota Territory 1856 C. 160. Note that the organic law of the Northern Pacific Railway gives each share of stock a vote, imposes no restraint on alienation, and permits meetings for the election of directors to be held at such places as the board shall designate. See 13 U. S. Stat. at Large (1864) p. 365; Private Laws of Wisconsin, 1870, p. 326.

II. The ground of action in each suit is purely statutory. No common law injury is disclosed. No common law principle can be invoked by the complainants, except in aid of statutory interpretation.

III. The Securities Company is the principal defendant in all the suits, since in each its holding of stocks is the immediate cause of the alleged offence. In fact, except as Minnesota seeks to restrain the Great Northern Railway from allowing the Company to vote its stock, the Company seems to be the only defendant of absolute importance in any of the suits.

IV. The Company was chartered by the State of New Jersey in consonance with a policy which another State cannot subvert unless its execution entails a positive legal injury quite independent of any dissonance with a policy adopted by the protesting State. Nor can the Federal Government interfere unless its execution invades a province where Federal authority is supreme.

V. The Company is a "foreign" corporation to Washington and to Minnesota; and to the United States it is, in respect of this suit, a "person" in New Jersey amenable to no larger Federal control than a natural person in the State.

VI. It seems that the Great Northern and Northern Pacific stocks are not subject to a pertinent restraint on alienation.

VII. The Company has acquired the complete ownership of stocks in the exercise of its charter powers. While it is not conceded that either the motive, or the manner of acquisition is of consequence in these suits for violation of public statutes, where the gravamen of the charges is the illegal effect of the holding of stocks, it is submitted that the transaction is thoroughly regular. In acquiring the stock the Company obtained marketable property of a personal nature upon terms acceptable to the vendors.

VIII. Through the acquisition of stocks the Company has become a majority shareholder in two railway corporations which were in a position to compete for traffic between States, and within States.

IX. As a majority stockholder the Company has a legal capacity for control as large as, but no larger than that of a natural person occupying a like position. This control permits the administration of the railroads in substantial harmony. If there be a monopoly here, it is what is called a " virtual monopoly."

X. The Act of 1890 has been construed to condemn all contracts " in restraint of trade " without regard to the common law distinction between lawful and unlawful restraints, but it should not be so construed as to condemn a virtual monopoly created by the acquisition of property under State laws. The right of Congress to regulate interstate commerce does not include a power to forbid such acquisitions.

Applying the statements pertinent to the State suits it seems that the Securities Company, being a foreign corporation to Washington and to Minnesota, is under no obligation to obey the statutes of these States unless it comes within the jurisdiction. With Washington it has no relation whatever: It need do no act in Minnesota; and even if a Great Northern stockholders' meeting should be held there it would be entitled to vote in virtue of a charter right appertaining to the stock itself.

Applying the statements pertinent to the Federal suit it seems that the Securities Company acquired its stocks under a State authorization which the Federal Government is powerless to impugn, and that in merely holding stocks and exercising a stockholder's rights it does not maintain a monopoly forbidden by the Act of 1890.

70. The foregoing conclusions appear to be derived from established principles, but some important questions involved in the cases at bar have never been finally adjudicated, and the litigation of novel questions of intense popular interest sometimes evokes new readings, and, despite the conventional assumption that judges do not legislate, even new standards of law.

These novelties contribute in great part to the gradual development of law to keep pace with changing, and, let us hope, improving conditions. It is the novelty which is induced by some insistent " public policy " that is most open

to criticism. For this too often indicates a pressure of "popular opinion" to which courts should never yield until, embodied in valid legislation, it stands for "popular judgment."

While the mistake of extracting law from considerations of mere policy is not always avoided by the judiciary, it is frequently pointed out, and we have a recent addition to these warnings in an opinion by Lord Halsbury, who said the other day:

"I do not think that the phrase 'against public policy' is one which in a court of law explains itself. * * * In treating of various branches of the law learned persons have analyzed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or what is relevant here, the assisting of the King's enemies, are all undoubtedly unlawful things, and you may say that it is because they are contrary to public policy that they are unlawful; *but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a judge or court have a right to declare that such and such things are in his, or their, view contrary to public policy.*"[1]

71. One who dissents from my conclusions without questioning my views in respect of public policy may strive to reach the heart of the matter by an argument running something like this: "Three sovereigns have declared their hostility to conditions calculated to restrain railway competition, and the United States, at least, have made their declaration most explicit. Now you concede that the Securities Company is in a position to restrain competition between two interstate lines. You concede that the railway corporations themselves could not make a lawful agreement looking to restraint. How, then, can you maintain a right in the Company to hold the position? How deny to a court of equity the ability to pierce the corporate disguise, and unmask the men who have organized the Company for the purpose of bringing two railway corporations into a relation which the corporations themselves could not create?"

Before answering this argument, I call attention to one of the earliest and most persistent eccentricities in the history of jurisprudence—the occasional and lawful co-existence of

[1] Janson *v.* Driefontein Mines [1902] A. C. 491. The italics are mine.

prohibition and permission, of incapacity and capacity, of disability to do a thing in one way, and ability to do it in another. The Roman was told by the Twelve Tables that a thing bought and sold must be actually before the parties, and handled by the purchaser, and thus the text stood until the time of Justinian. Yet long before the foundation of the Empire the Roman people had emerged from the primitive conditions in which this rule was developed, and pressed to circumvent a law which reverence stayed them from repealing, they had secured the facile transfer of their varied objects of property through the medium of frankly collusive actions brought before the prætor. Religious corporations desiring to hold land in England were confronted by the Statutes of Mortmain, which forbade the passing of land into the "dead hand" of the Church. Confronted they were, but not barred, for through the accepted means of a conveyance in trusts they obtained the beneficial use of land. These are classic types of a number of legal eccentricities, helpful, cumbersome, whimsical and hypocritical. Together they present an odd phase of that union of conserving and innovating forces which has made for stable progress in civilization.

72. Private law is not free from eccentricities to-day, though many ancient fictions have been discarded, but as Justice Holmes says "when logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way."[1] If the Supreme Court should find nothing in the way of a decree against the defendants in a suit at bar except a fiction of this sort it might sweep this aside. But the Court will find a corporation—the Securities Company—a fiction to be sure as are all corporations, yet not one of the negligible kind, but a "person" deliberately created by a State of the Union. This presents a constitutional question.

The workings of constitutional law in the United States disclose striking peculiarities due to the structure of the republic, with its separate States of original and equal powers and its Federal Government of delegated and supreme powers. This arrangement is supposed to leave

[1] Blackstone v. Miller, U. S. Supreme Court, Jan. 26, 1903.

no room for a conflict of powers, but it affords more or less opportunity for flank movements. For example, Congress cannot prohibit a State bank from issuing notes not within the definition of the "bills of credit" forbidden by the Constitution,[1] but it can tax the notes so heavily as to discourage their issue.[2]

It is in the segregation of States, and the division of power between the States and the United States that we find constitutional reasons why a court of equity which is authorized to enjoin competing interstate railways from making rate agreements, is nevertheless incompetent to condemn the Securities Company for acquiring majority interests in their stocks. The railways are State corporations, but in making rates for interstate transportation they come within the regulating power of Congress. The Securities Company is a State corporation also, but when it becomes a stockholder in the railways Congress cannot drag it within Federal jurisdiction as a person engaged in interstate commerce and restraining competition therein within the meaning of the Act of 1890. Nor can other States convict the Company of a lawless disregard for their local policies, merely because it buys stock in their corporations.

I venture to crystallize the primary argument for the defence in all the suits in this proposition. A corporation chartered by a State of the Union, like a natural person therein, is entitled to acquire property (not subject by the law of its being to a pertinent restraint on alienation) free from interference by the United States or another State.

NOTE. The New Jersey Court of Errors and Appeals has just rendered a decision in Coler *v.* Tacoma Railway & Power Co. (Mar. 2, 1903).

This New Jersey company, which owned and operated a street railway in the State of Washington, agreed to transfer to a Washington corporation all its property and franchises, except the franchise of being a corporation, in exchange for shares of the latter's stock. The Court enjoined the transaction at the instance of a stockholder in the New Jersey Company. After giving two causes for injunction the Court says:

"In yet another aspect this arrangement should be disapproved.

[1] Briscoe *v.* Bank of Kentucky (1837), 11 Peters, 257.

[2] Veazie Bank *v.* Fenno (1869), 8 Wall., 533.

"The Courts of Washington have decided that one corporation cannot subscribe for, purchase, hold or vote upon the shares of stock of another corporation, without legislative sanction, and that the legislature of the State has never sanctioned such acts (Denny Hotel Co. *v.* Schram, 6 Wash. 134; Parsons v. Tacoma Smelting & Ref'g. Co., 65 Pac. Rep. 765). This doctrine rests altogether on considerations of public policy. But it is said that the policy as declared extends only to domestic corporations, and whether it should embrace foreign corporations is a matter to be decided by the Courts of that State alone. I do not understand that the policy is so restricted. One of its objects is to prevent one corporation from interfering with the control of another. This was the purpose to be subserved by the decision in Parsons *v.* Tacoma S. & R. Co. just cited, where, although the title of the stockholding company was not assailed, its right to vote upon the stock was denied. It is true that the stockholding company was a domestic corporation; but the denial of its right to vote could not be based on that circumstance. The doctrine, that it was impolitic to allow a corporation, whose chartered powers were subject to modification at the will of the State, to exercise control over a domestic corporation, would seem necessarily to imply that it was deemed equally impolitic to permit such control by a corporation whose chartered powers were generally independent of the State. The application of the restriction to a foreign corporation is a mere interpretation, not an extension of the doctrine.

"But if it be an extension, the extension is made by the Constitution of Washington, which provides (Art. XII, par. 7) that 'No corporation organized outside the limits of this State shall be allowed to transact business within the State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State.'

"The decisions already cited are clearly to this effect, that, if a Washington corporation owned property immovably fixed in that State, it could not lawfully bargain to exchange that property for stock in another Washington corporation, and after completion of the exchange exercise in the other corporation all the rights and privileges of a private stockholder. If this New Jersey corporation can legally do what is thus prohibited to a Washington corporation, then the foreign corporation is allowed to transact business in Washington on conditions more favorable than those prescribed for its domestic corporations. The constitution forbids this."

As this opinion is of interest in a discussion of the Securities Company cases I recite its material passages in full, but I cannot lengthen an already long discussion by making adequate comment. Suffice to say the opinion does not seem to necessitate any substantial modification of the text of this article.

CARMAN F. RANDOLPH.